80348-0

No. _____

SUPREME COURT
OF THE STATE OF WASHINGTON

No. 57296-2-I

COURT OF APPEALS, DIVISION I
OF THE STATE OF WASHINGTON

In re the Marriage of:

GLORIA BERNARD
Respondent,

vs.

J. THOMAS BERNARD,
Petitioner.

ANSWER TO PETITION FOR REVIEW

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I. IDENTITY OF RESPONDENT

Respondent Gloria Bernard submits this answer to petitioner Thomas Bernard's petition for review pursuant to RAP 13.4(d).

II. RESTATEMENT OF THE CASE

This is not a remarkable case. The only remarkable aspect of this case is that the husband, with the advice of well-respected and competent counsel, attempted to impose, and persists in trying to enforce, substantively indefensible marital agreements that were executed under classic circumstances of over-reaching making such agreements procedurally unfair. His efforts in this Court extend to a recital of "facts" that bears no resemblance to those found by the trial court. The following restatement of the case is based largely on the facts relied on by the Court of Appeals, supported by citations to the "substantial credible evidence" in the record that caused the courts below to reject the agreements as substantively and procedurally unfair:

A. The Execution Of The Agreements.

Tom Bernard hired Gloria Whitehead as his secretary in 1995. (I RP 35-36; CP 199) Both had been married before; both had teenage children. (I RP 38-39, II RP 153) In April 1999, they were engaged to be married. (II RP 156) Tom, a real estate

developer, had net worth at the time of approximately $25 million. Gloria's net worth was $38,000. (Ex. 101, Schedule A, B)

When he proposed, Tom mentioned a prenuptial agreement. (I RP 38) Gloria said she would sign an agreement. (I RP 38-39) But Tom did not contact his attorney of 25 years about the matter right away. (III RP 29) Tom testified that he did not do so because "we weren't about to get married, you didn't need to negotiate a prenup' unless the wedding is coming up." (III RP 29)

On May 24, 2000, less than six weeks before the July 8 wedding, Tom's attorney, Richard Keefe, faxed him a checklist of items to be included in a prenuptial agreement. (II RP 87-88; Ex. 140) Tom lost the list. (II RP 148) Keefe resent it on June 8, a month before the wedding. (II RP 149)

Keefe advised Tom that Gloria should make an appointment with an attorney once he and Tom had prepared a working draft of the agreement. (*See* Ex. 140 at 2) On June 20, 18 days before the wedding, Gloria finally received a draft of the agreement. (I RP 94) This draft still contained a number of blanks, including provisions relating to either party's death during the marriage, life insurance policies, and employee benefits. (Ex. 10 at 7, 11-12) With draft agreement in hand, however, Gloria stepped up her search for an

attorney. (I RP 40-41, II RP 67) At the same time, she was working for Tom, (at his direction) preparing Tom's financial statement to attach to the agreement, moving out of her home and into Tom's, preparing for her daughter's high-school graduation and trip to Mexico, and finalizing the wedding plans. (I RP 103, II RP 73, III RP 32-33, V RP 14-15)

After many inquiries, Gloria was referred to attorney Marshall Gehring by another of Tom's employees. (I RP 95-96) Gehring first received a draft of the agreement from Keefe on the evening of July 5, three days before the wedding. (I RP 82; Ex. 108 at 100038) This draft had blanks from the earlier draft filled in, but Keefe's cover letter to Gehring cautioned that Tom had not yet seen the agreement. (Ex. 108 at 1000038)

On the day before the wedding (which was less than 48 hours after he received the draft), Gehring faxed a letter to Gloria (and Keefe) that advised Gloria not to sign the agreement. (II RP 49-50, Ex. 102) Gehring cited five major concerns with the agreement. These were not the only problems he noted, but "time was short." (Ex. 102, I RP 168-69, II RP 3-4)

Gehring acknowledged that refusing to sign the agreement was probably not practical for Gloria. (Ex. 102) And Gloria testified

that she felt she had no alternative to signing the agreement. (CP 204, also admitted as part of Ex. 113) To refuse would mean canceling the wedding, because the agreement was a test of her love and loyalty. (CP 204) Nevertheless, Gloria did not feel that the agreement was fair. (CP 205) Even Tom conceded that the first agreement was "not the best thing." (III RP 32)

Keefe and Tom drafted a "side letter," agreeing to amend the prenuptial agreement with respect to the five issues raised in Gehring's letter, by a date certain a few months after the wedding. (III RP 6, 8, 9-10, Ex. 103) The side letter stated that if the parties failed to reach agreement on an amendment, the original agreement would remain in full force and effect. (Ex. 103) Gloria signed both the prenuptial agreement and the side letter within 24 hours of the wedding. (Ex. 101, 103, II RP 51-52, 54, III RP 8-9) The side letter incorporated Gehring's suggestions, but Gloria signed it without first consulting Gehring. (I RP 108, II RP 23, 54)

In August 2001, the parties executed an amendment containing the terms in the side letter. (*See* Ex. 104) Gloria believed that no terms of the agreement were open for discussion other than those mentioned in Gehring's letter. (II RP 23, 24, 38-39, 45) Gloria signed the amendment because Gehring told her

that having signed the prenuptial agreement she was "stuck with it," but at least the amendment was a "little bit better." (II RP 41, 71)

B. The Terms Of The Agreements.

The prenuptial agreement as amended still severely restricted Gloria's community property rights. The agreement provided that "[a]ll wages, salary and remuneration for services or labor" were community property, but specifically excluded from the definition of "salary" any proceeds from the husband's "time and energy to manage and oversee his separate property real estate ventures." (Ex. 101 at 4-5) The amendment further isolated the fruits of Tom's labor from becoming community property by providing that his salary, "shall not include any draws, distributions or renumeration to Husband attributable to or arising out of his time and energy expended to manage or oversee his separate property investment account." (*See* Ex. 104 at 1-2) Since both parties worked in the husband's real estate business, the effect of this clause was that the wife's modest salary, which itself was determined and paid by Tom, would be the only community income.

The agreement provided that in lieu of any of husband's profits or earnings, services or labor being considered community property, he would allow the community to live in his separate

residence, pay for its maintenance and upkeep, fund a household operational account, and partially fund a joint living account. (Ex. 101 at 4-5) Although he had earned over $500,000 the previous year, the agreement provided that Tom would only be required to contribute $100,000 per year to the joint living account. (Ex. 101 at 5, Schedule A at 4)

The agreement further provided that "[n]ot withstanding the other provisions of this Agreement, the parties intend that upon the marriage the balance in the Community Property Accounts ONLY and future contributions to these accounts and monies on deposit therein shall be community property." (Ex. 101 at 6, emphasis in original) Thus, the only community property accrued during the marriage would be what was left after paying living expenses from the joint living account, to which only Gloria was obligated to contribute her earnings. If the parties divorced, the prenuptial agreement provided that the community property was to be divided equally, and that the wife could not seek spousal support. (Ex. 101 at 10-11) The agreement also undercut Tom's previous promise to pay for Gloria's daughter's college education, by providing that any such payments "not identified as gifts" would be considered loans,

and repayable from the wife's separate estate. (III RP 56; Ex. 101 at 9)

Each of these provisions was perpetuated in the amendment to the agreement. (Ex. 104)

C. The Trial.

Gloria filed for divorce in early 2005. (CP 3) Tom demanded arbitration based on the original agreement's arbitration clause. (CP 137) Gloria moved for summary judgment to have the entire agreement, including the arbitration clause, declared unenforceable. (CP 302) The trial court declared the agreements substantively unfair as a matter of law, denied Tom's motion to compel arbitration, and conducted the first part of a bifurcated trial to examine the procedural fairness of the agreement as amended. (CP 2397-98) After a five-day trial, the trial court found that because the side letter did not allow for renegotiation of the entire agreement, the amendment did not cure the procedural defects in the original agreement, and that the agreements taken together were procedurally unfair. (CP 2402, FF 2.5(27))

D. The Appeal.

The husband was allowed to appeal the trial court's orders as a matter of right because the court's order had the effect of

denying arbitration under the agreement. ***Herzog v. Foster & Marshall, Inc.***, 56 Wn. App. 437, 441-45, 783 P.2d 1124 (1989). Division One affirmed. ***Marriage of Bernard***, 137 Wn. App. 827, 155 P.3d 171 (2007). Division One held that both the prenuptial agreement and amendment were substantively unfair. 137 Wn. App. at 834-35, ¶ 15. Division One also held that both the prenuptial agreement and the amendment were procedurally unfair. 137 Wn. App. at 837, ¶ 23. The husband concedes that the prenuptial agreement was unfair, but challenges the determination that the amendment was procedurally unfair. (Petition 11)

Division One held that because the amendment "was based almost completely on the side letter, which was as rushed and procedurally flawed as the prenuptial agreement itself," the amendment was also procedurally flawed. 137 Wn. App. at 837, ¶ 23. Division One determined that regardless of the time allowed to "negotiate" the amendment, the wife did not have the benefit of independent counsel, the bargaining positions of the parties were grossly imbalanced, and at no time did the wife have full knowledge of her rights. 137 Wn. App. at 835, ¶ 16.

While not addressed in the husband's petition, Division One also spent a significant portion of its decision discussing whether

arbitration clauses seated within a prenuptial agreement should be viewed independently to determine whether the clause itself is substantively or procedurally unconscionable. ***Bernard***, 137 Wn. App. at 832-33, ¶¶ 9-12. Despite the writing judge's apparent interest in this issue, Division One did not resolve the question because the issue was not adequately raised or briefed in the trial or appellate court. 137 Wn. App. at 833, ¶ 12. The husband also has not challenged this determination in his petition.

III. ARGUMENT WHY REVIEW SHOULD NOT BE ACCEPTED

A. Whether "Substantial Credible Evidence" Exists To Support The Court Of Appeals Decision Is Not A Basis For Review In This Court.

The factual premise of the husband's petition for review is that the conflicting evidence presented in the trial court should be viewed in the light most favorable to *him,* and that the Court of Appeals erred in not relying on the evidence that *he* presented in support of reversal. (Petition 9-13) But it is well settled that credibility determinations cannot be reviewed on appeal. ***Morse v. Antonellis***, 149 Wn.2d 572, 574, 70 P.3d 125 (2003). On review for "substantial evidence," evidence will be viewed "in the light most favorable to McGuire, as "the party who prevailed in the highest forum that exercised fact-finding authority, a process that

necessarily entails acceptance of the factfinder's views regarding the credibility of witnesses and the weight to be given reasonable but competing inferences." ***City of University Place v. McGuire***, 144 Wn.2d 640, 652-53, 30 P.3d 453 (2001)(citation omitted). In this case, the wife was the prevailing party and all evidence must be viewed in the light most favorable to her.

The husband claims that the "limitations on [the wife's] counsel's independence and performance were neither caused by, or known by, the husband or his attorney" (Petition 11), but there is much evidence to the contrary. The husband claims "the wife and attorney had the benefit of about 14 months between the two Agreements to negotiate and raise their issues." (Petition 11) But the plain language of the side letter drafted by the husband's attorney and signed by the wife on the day of the wedding limited the issues that could be raised in the amendment. (Ex. 103)

The trial court found, and Division One agreed, that *any* length of time could not cure the procedural defects caused by the side letter:

> Wife had no reason to believe the entire agreement was open for renegotiation and, by the terms of the "side letter," it was not... Procedural fairness that would otherwise allow a knowing and intelligent waiver of a substantively fair agreement could not do so under these circumstances. As the scope of the

> negotiations allowed by the "side letter" were so specifically limited, the fact that there was sufficient time for independent review and for the advice of counsel was insufficient to cure the defects of the first agreement.

(CP 2402, FF 2.5(27)); ***Bernard***, 137 Wn. App. at 837, ¶21: "[T]he amendment was nothing more than a codification of the provisions of the side letter, which Gloria signed the day of the wedding. . . Any procedural analysis of the amendment must take the circumstances of the side letter into account. Procedurally the side letter was adopted in the same manner as the original agreement: finalized and signed within 24 hours of the wedding."

Further, the Court of Appeals held that the wife did not voluntarily enter into the agreements because of the "grossly imbalanced" bargaining positions of the parties. ***Bernard***, 137 Wn. App. at 836, ¶ 20. Unlike the wife in ***Marriage of Hadley***, 88 Wn.2d 649, 565 P.2d 790 (1977), who testified that "she was not forced to sign the agreements and did not feel her relationship with her husband would change had she declined to sign," 88 Wn.2d at 655, the wife in this case believed that she had no choice but to sign the agreement and amendment:

> If Gloria refused to sign the amendment, she stood to lose her husband, her job of seven years, and her home. She had not arranged for financial aid for her children's education because Tom had promised to

> assist them. Gloria had deposited half her annual salary into a community property account, half of which Tom would retain if she left. Finally, the side letter made clear that if Gloria did not sign the amendment, then the original agreement would remain in force.

Bernard, 137 Wn. App. at 836-37, ¶ 20; (*See* CP 204). In fact, the husband testified that he would have divorced the wife had she not signed the amendment as he would assume that the wife just "wanted his money." (III RP 24-25)

"Substantial credible evidence" supports Division One's holding that the circumstances surrounding entry into the amendment were procedurally unfair. Similar results abound in this State's published decisions.[1] In any event, whether "substantial credible evidence" supports the Court of Appeals decision is not a basis for review under RAP 13.4(b), and the Court of Appeals opinion is wholly consistent with ***ZeBarth v. Swedish Hospital Medical Center***, 81 Wn.2d 12, 499 P.2d 1 (1972) (Petition 2, 10). This Court in ***ZeBarth*** specifically rejected considering certain assignments of error by the Petitioner because evidence "sustains

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[1] *See e.g.* ***Friedlander v. Friedlander***, 80 Wn.2d 293, 494 P.2d 208 (1972); ***Hamlin v. Merlino***, 44 Wn.2d 851, 272 P.2d 125 (1954); ***Marriage of Foran***, 67 Wn. App. 242, 843 P.2d 1081 (1992); ***Marriage of Matson***, 41 Wn. App. 660, 705 P.2d 817 (1985).

the verdict." 81 Wn.2d at 18 ("Since the evidence sustains the verdict, these particular assignments of error need no further discussion"). Likewise, this Court should reject the petitioner's challenge to the Court of Appeals decision because there was "substantial credible evidence" to support the decision by the trial court, as well as the Court of Appeals.

B. The Husband's Challenges Relating To The Competency Of The Wife's Counsel Are Not A Basis For Review Because Counsel's Limitation Arose From The Undisputed Procedural Defects Of The Original Agreement.

The husband misses the point of the Court of Appeals decision holding that the execution of the prenuptial agreement and the subsequent amendment was procedurally unfair. The Court of Appeals' decision was not based solely on the competency of the wife's attorney, as the husband claims. (Petition 13-15) Rather it was based on the fact that the wife's attorney was limited in his ability to appropriately counsel her by the procedural failures in executing the original agreement and side letter – failures that were caused by the husband. In that regard, the Court of Appeals decision is wholly consistent with ***Hadley*** and ***Marriage of Cohn***, 18 Wn. App. 502, 569 P.2d 79 (1977) (Petition 2-3, 13-14).

The Court of Appeals noted that when wife's attorney received the original agreement – less than three days before the wedding – his role was "limited to commenting on unfair provisions and advising Gloria whether or not to sign the document as written." ***Bernard***, 137 Wn. App. at 835, ¶ 17. Due to the time limitations created by the husband, Gehring could not fulfill his "primary duty" as independent counsel, which is "assisting the subservient party to negotiate an economically fair contract." ***Bernard***, 137 Wn. App. at 835, ¶ 17 (*citing* ***Foran***, 67 Wn. App. at 254). While the Court of Appeals acknowledged that there was additional time to negotiate the amendment, both the attorney and wife believed that they were limited to the specific issues in the side letter. ***Bernard***, 137 Wn. App. at 835, ¶ 17. As the trial court found, this belief was reasonable based on the plain terms of the side agreement. (CP 2402, FF 2.5(27))

Relying on ***Hadley,*** the husband claims that he did not know of the defects in the wife's legal representation, and thus should not be penalized. (Petition 15) But this case is entirely different. In ***Hadley,*** the wife testified that she did not feel compelled to sign the agreements, and the husband demonstrated "good faith, candor and sincerity in his dealings with Mrs. Hadley. His actions were

consistent with those required in a relationship of trust and confidence." 88 Wn.2d at 655. As a consequence, this Court held that the husband should not be penalized for the wife's failure to obtain counsel to represent her. ***Hadley,*** 88 Wn.2d at 655.

In this case, on the other hand, the husband did not act in "good faith, candor and sincerity in his dealings" with the wife, and it was the husband's delay in drafting and presenting the prenuptial agreement that created the procedural defects in the first place. The husband waited until a little more than two weeks before the wedding to present the wife with an incomplete draft, and until two days before the wedding to provide her counsel with a "complete" agreement. (I RP 94, I RP 82) As the Court of Appeals noted, this left the wife in a precarious situation, where her only choice was to sign the agreement or to jeopardize her employment, her daughter's college education, and her home. ***Bernard***, 137 Wn. App. at 836-37, ¶ 20. Because the husband was the cause of the defects in the wife's legal representation, he in fact was responsible for the deficiencies in her counsel.

The Court of Appeals decision is also consistent with ***Cohn*** (Petition 14). As in ***Hadley,*** the appellate court in ***Cohn*** affirmed a trial court order, enforcing pre- and post-nuptial agreements

executed by the parties. In affirming, the Court of Appeals took note of much evidence of procedural fairness that is not present in this case. For example, the wife in ***Cohn*** had "several" months to negotiate the prenuptial agreement, unlike the wife here who had only days to "take it or leave it." 18 Wn. App. at 506. The trial court in ***Cohn*** found that the wife did not act under duress, undue influence, or under pressure in signing the agreement, 18 Wn. App. at 503, unlike here where the court found that the wife was forced to sign a substantively unfair agreement the night before her wedding or suffer the "humiliation of calling off the wedding." (CP 2402, FF 2.5(23)) Finally, it was the wife who selected the attorney to draft the second agreement at issue in ***Cohn,*** 18 Wn. App. at 510, unlike in this case where the terms of the second agreement were dictated by a side letter drafted by the husband's attorney, "tuned up" by the husband (III RP 6), and presented and signed under circumstances even more rushed and unfair than the prenuptial agreement.

To the extent the Court of Appeals relied on the wife's counsel's incompetence in holding that a substantively unfair agreement was not enforceable against the wife, its decision is not inconsistent with ***State v. McFarland,*** 127 Wn.2d 322, 899 P.2d

1251 (1995) (Petition 2, 13, 15). In ***McFarland,*** two criminal defendants appealed their convictions based on claims of ineffective assistance of counsel. This Court noted that there is a "strong presumption counsel's representation was effective" but that this presumption can be rebutted upon a showing that "(1) defense counsel's representation was deficient, *i.e.,* it fell below an objective standard of reasonableness based on consideration of all the circumstances; and (2) defense counsel's deficient representation prejudiced the defendant, *i.e.,* there is a reasonable probability that, except for counsel's unprofessional errors, the result of the proceeding would have been different." 127 Wn.2d at 334-35.

The husband's analogy between a criminal defendant's claim of ineffective assistance of counsel and a spouse's claim that she was unable to enter into a marital agreement with full knowledge of her rights is questionable. But even based on this Court's test in ***McFarland***, the wife rebutted any presumption of competent counsel.[2] First, as the Court of Appeals noted, Gehring's representation was deficient because he failed to explain

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[2] This point alone distinguishes this case from ***McFarland.*** The burden is on the party seeking enforcement of a marital agreement to prove its fairness. ***Friedlander,*** 80 Wn.2d at 300; ***Hadley,*** 88 Wn.2d at 667; ***Cohn,*** 18 Wn. App. at 505.

community property or how the agreement altered the wife's rights under the law, provided the wife with inaccurate information regarding her ability to avoid arbitration, and erroneously told her that the courts would not enforce the prenuptial agreement after "a few years had passed." ***Bernard***, 137 Wn. App. at 835-36, ¶ 17-19.

Second, the deficient representation prejudiced the wife. The wife was unable to enter into a substantively fair agreement because she was provided with inaccurate information, and admittedly could not enter into a procedurally fair agreement because she did not have full knowledge of her rights. Although petitioner's reliance on this criminal case is misplaced, the Court of Appeals decision holding that the prenuptial agreement entered into by the wife based on erroneous information from her counsel was not enforceable is not inconsistent with this Court's decision in ***McFarland.***

Remarkably, in the end this petition is premised on a claim that the wife's attorney owed the *husband* a duty to insure an enforceable agreement. (Petition 17, *citing* ***Marriage of Foran***, 67 Wn. App. 242, 255, 834 P.2d 1081 (1992)). But it is in fact the duty of the attorney representing the economically advantaged spouse

to counsel him to enter into a fair agreement. ***Foran,*** 67 Wn. App. at 255, fn. 14 ("A client is not well served by an unenforceable contract, marital tranquility is not achieved by a contract which is economically unfair or achieved by unfair means"). It was the husband's attorney who should have counseled the husband to draft an agreement that treated the wife fairly or gave the wife sufficient time to knowingly and voluntarily enter into an agreement that so favored the husband. This Court should reject the petitioner's challenge to the Court of Appeals decision because counsel's limitations arose from undisputed procedural defects caused by the husband.

C. The Wife Is Entitled To Her Attorney Fees Award.

The trial court has awarded attorney fees to the wife on appeal on the authority of RAP 7.2(d) and ***Stringfellow v. Stringfellow,*** 53 Wn.2d 359, 361, 333 P.2d 936 (1959). The wife asks this Court to confirm the trial court's award of attorney fees or make an independent determination that the wife is entitled to fees in this Court under RCW 26.09.140 and RAP 18.1(j).

IV. CONCLUSION

Nearly three years after the wife filed for divorce, the husband continues his quest to enforce an agreement that he

concedes is unfair. The husband claims that the wife should seek recourse from her attorney if she objects to the agreement that she was forced to sign on the eve of her wedding. It might be wiser for the husband to look to his own counsel if he was advised that an agreement that prevented the accumulation of community property and that would leave the wife a relative pauper on divorce or death, provided to the wife less than three days before their wedding, would be enforceable. This Court should deny review and allow the parties to proceed with dissolving their marriage.

Dated this 6th day of July, 2007.

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DECLARATION OF SERVICE

The undersigned declares under penalty of perjury, under the laws of the State of Washington, that the following is true and correct:

That on July 6, 2007, I arranged for service of the Answer to Petition for Review, to the court and to counsel for the parties to this action as follows:

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DATED at Seattle, Washington this 6th day of July, 2007.

La Shona D. Fairman

La Shona D. Fairman